THE CANADIAN
BAR ASSOCIATION
British Columbia Branch

October 5, 2014 Delivered by Email: CPLO_TrusteeAct@gov.bc.ca

Civil Policy and Legislation Office
Justice Services Branch
Ministry of Justice
PO Box 9222 Stn Prov Govt
Victoria, BC V8W 9J1

Dear Sirs/Mesdames:

Re: Consultation regarding *Trustee Act*

The Canadian Bar Association nationally represents over 39,000 members and the British Columbia Branch (the "CBABC") has over 6,900 members. Its members practise law in many different areas and the CBABC has established 78 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared the CBABC Charities and Not-for-Profit Law Section (the "Section"). The Section represents lawyers in British Columbia who advise charities and other non-profit organizations as well as donors of charitable gifts. These submissions reflect the views of the Section only and are not necessarily the views of the CBABC as a whole.

We are delighted that after the extensive work that went into the British Columbia Law Institute's report, *A Modern Trustee Act for British Columbia*, that the Province is now considering amendments to the *Trustee Act*. We also commend the work of the Uniform Law Conference of Canada in this regard.

In keeping with the focus of the Section, our comments are limited to those portions of the *Uniform Trustee Act* (the "Act") that deal with matters relating to charitable and non-charitable purpose trusts, in particular Part 5 and Part 7 of the Act.

A. **Part 5 – Variation and Termination of Trusts**

We are strongly in favour of the reform of the Rule in *Saunders v. Vautier* set out in section 59 of the Act as it supports the contention that those beneficiaries who hold the beneficial interest in the entirety of the trust property should be entitled themselves to decide how such property should be administered and/or distributed.

We support the clarification of the common law set out in sub-sections 60(1)(c) and (7)(b) of the Act which provide that the court may approve an arrangement when the object of the trust is a charitable purpose or a non-charitable purpose as described in the Act. With respect to the court's discretion to approve an arrangement on behalf of a "charitable organization" under sub-sections 61(1)(b) and 7(a), there are a limited number of circumstances where these sections would come into play. For charities incorporated as non-share corporations, it is difficult to conceive of a situation where the charity would be incapable of providing consent. The trustee of a charitable trust could provide consent but it is conceivable that a trustee, if an individual, could be incompetent or otherwise incapable. There are however charities that are neither a trust nor an incorporated entity. Such unincorporated associations are most frequently church congregations.

We note that while the term "charitable organization" is not a term of art within the common law of charities, it is a defined term in the *Income Tax Act* (Canada) (the "ITA"). Section 149.1(1) of the ITA creates requirements for "charitable organizations", as defined, that go beyond the requirements of the common law, including the requirement that more than 50% of the organization's directors deal with each other at arm's length. Given that British Columbia's *Trustee Act* and the ITA regime for registered charities will operate in close conjunction in the province's charitable sector, the use of the term "charitable organization" in the *Trustee Act*, and particularly so when undefined, may cause some confusion. We suggest that the Province consider using a different term (such as "charitable entity") that is not integral to the ITA regime.

B. **Part 7 – Charitable Gifts, Charitable Trusts and Non-Charitable Purposes Trusts**

We are strongly in favour of the powers described in section 70 of the Act which clarify the court's power to vary charitable gifts and trusts. The current state of the law relating to cy-près poses many practical difficulties and frequently results in unnecessary expense as the funds which were meant to be applied to a charitable purpose or beneficiary must be utilized to deal with technical legal problems which have arisen in the application of the funds either through poor drafting, the passage of time, or otherwise.

We are of the view, however, that a broader class of persons than the "trustee of a charitable trust" or the "personal representative of a donor" should have standing to seek relief under section 70. In many of the situations dealt with by members of the Section in recent years, it has been the object of the charitable gift that brings the application.

We suggest that in the British Columbia context, the potential class of applicants for cy-près schemes be broadened to "any person interested in the charity or charitable gift" which would include the Attorney General exercising his or her *parens patriae* jurisdiction.

We would take a similar position on standing with respect to section 75(2) that concerns trusts consisting of both charitable and non-charitable purposes.

C. **Section 40 - Total Return Investment**

We are also very supportive of the application of total return investment to assets held in an endowment or similar gift notwithstanding that the terms of the trust or gift do not contain a direction to that effect. This will eliminate many convoluted investment requirements that are simply out of step with modern portfolio theory and with which investment managers struggle to comply - and for which the charitable entity is required to pay more in investment management fees.

We note however that the definition of "assets" and "trustee" in sub-section 40(1) of the Act refer only to "non-profit" organizations. We again note our concern that as "non-profit organization" is a defined term in the ITA the potential for confusion exists. We further note that sub-section 40(5) references both the "trustee of a charitable trust" and the "directors of a non-profit organization". Given that "trustee" is defined in this section as "directors of a non-profit organization" this creates some circularity. We suggest also that the phrase "trustees of a charitable trust" needs to be included in the definition of "asset" in this section to ensure that it is parallel with sub-section 40(5).

We thank you again for this opportunity to provide you with our views, and remain,

Yours truly,

Per: Michael P. Blatchford
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